

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill increases the regulation of notaries public.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

A notary public (hereinafter "notary" or "notaries") is a "public officer appointed and commissioned by the Governor whose function is to administer oaths; to take acknowledgments of deeds and other instruments; to attest to or certify photocopies of certain documents; and to perform other duties specified by law."¹

Chapter 117, F.S.,² provides for notaries and directs that the Governor is authorized to appoint as many notaries as necessary.³ A notary must be at least 18 years of age, maintain legal residence in the state throughout the commission, and possess the ability to read, write, and understand English.

Once appointed, a notary serves a four-year term.⁴ During the term of office, a notary must post and maintain a \$7,500 bond payable to any individual harmed as a result of a notaries breach of duty.⁵ The bond must be approved and filed with the Department of State and executed by a surety company that is authorized to transact business in Florida.⁶ If a surety pays an individual harmed by the notary for breach of duty, the company must notify the Governor of the payment and the underlying circumstances.⁷

Duties of a Notary

A notary is approved to perform six functions: administer oaths or affirmations;⁸ take acknowledgements;⁹ attest to photocopies of certain documents;¹⁰ solemnize marriage;¹¹ verify vehicle identification numbers;¹² and certify contents of a safe-deposit box.¹³ With the exception of solemnizing a marriage, a notary public cannot charge more than \$10 for each notarial act.¹⁴ Any person who unlawfully possesses a notary public official seal or any papers or copies relating to notarial acts is guilty of a misdemeanor of the second degree,¹⁵ as anyone who impersonates a notary.¹⁶

¹ *Governor's Reference Manual for Notaries*, State of Florida, November 2001 ed., pg. 6 (hereinafter "*Reference Manual*").

² See 1 Fla. Jur 2d Acknowledgments s. 42 stating, "[b]ecause a notary public is generally held to be a public officer, the eligibility of a person to be a notary public is largely regulated by statutory provisions," and citing *Smith v. McEwen*, 161 So. 68 (1935) (notaries public are recognized officers of Florida).

³ Section 117.01(1), F.S.

⁴ *Id.*

⁵ Section 117.01(7)(a), F.S.

⁶ *Id.*

⁷ Section 117.01(8), F.S.

⁸ Section 117.03, F.S.

⁹ Section 117.04, F.S.

¹⁰ Section 117.05(12)(a), F.S.

¹¹ Section 117.045, F.S.

¹² Section 319.23(3)(a)2., F.S.

¹³ Section 655.94(1), F.S.

¹⁴ Sections 117.05(2)(a) and 117.045, F.S.

¹⁵ Section 117.05(3)(e), F.S.

¹⁶ Section 117.05(7), F.S.

Suspension of a Notary

The Governor can suspend a notary for any of the grounds provided in Art. 4, s. 7, Fla. Const.¹⁷ The Governor also may suspend a notary for grounds of malfeasance, misfeasance, or neglect of duty, as specified in s. 117.01(4), F.S.¹⁸

Effect of Bill

The bill requires a notary to maintain a journal of notarial acts.¹⁹ The journal can either be a paper journal or one maintained on a computer or other electronic device. The journal is to contain each notarial act in sequential order. The record in the journal must include the date, time, and type of notarial act; the title or name of the document or transaction; the printed name and signature of the signer; and the signer's complete address, telephone number, and specific type of identification presented by the signer.²⁰ The notarial journal must be maintained by a notary for at least 5 years after the date of the last entry. Should a journal be stolen, lost, misplaced, destroyed, or rendered unusable, the notary is required to immediately notify the Executive Office of the Governor in writing of the circumstances of the incident. The failure by a notary to comply with these requirements could result in the suspension or non-renewal of the notary's public commission by the Executive Office of the Governor.

A notary who is either an attorney licensed in this state or who is employed by an attorney licensed in this state is not required to maintain a journal of notarial acts.

Current law allows a notary to charge up to \$10 per notarial act.²¹ This bill specifies that a notarial act is the affixing of the notary's seal to a document accompanied by a written certification or jurat. A notary may not charge fees for services to a U.S. military veteran, firefighter, or law enforcement officer who is applying for a pension, allotment, allowance, compensation, insurance policy, or other benefit resulting from public service.

C. SECTION DIRECTORY:

Section 1 amends s. 117.05, F.S., defining notarial acts.

¹⁷ The grounds for suspension by the Governor found in Art. 4, s. 7, Fla. Const. are: "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony...."

¹⁸ Grounds of malfeasance, misfeasance, or neglect of duty, specified in section 117.01(4), F.S., include, but are not limited to: a material false statement on the application; a complaint found to have merit by the Governor; failure to cooperate or respond to an investigation by the Governor's Office or the Department of State regarding a complaint; Official misconduct as defined in s. 838.022, F.S.; false or misleading advertising relating to notary public services; unauthorized practice of law; failure to report a change in address or telephone number within the required time or failure to request an amended commission following a name change; commission of fraud, misrepresentation, or any intentional violation of ch. 117, F.S.; charging fees in excess of fees authorized by law; or failure to maintain the required bond.

¹⁹ In 1998, the Legislature enacted a law that required all electronic notarizations to be logged in a journal. See, ch. 98-246, L.O.F.; s. 117.20, F.S., (1998 Supp.). Each notarial act memorialized in the journal had to include certain information and be kept at least five years. If the journal was lost or stolen, the notary had to notify the Governor's Office or the Department of State. The notary public had to let the Governor's Office or the Department of State inspect the journal at any time it requested. In 1999, the law was repealed. See, s. 165, ch. 99-251, L.O.F. Although Florida law does not currently require the use of a notary journal, the *Governor's Reference Manual for Notaries* recommends that notaries voluntarily maintain a journal. *Reference Manual*, at 42.

²⁰ The National Notary Association ("NNA") compiled the Model Notary Act of 2002, which was an attempt to modernize the notary public office. The Act was the work of a drafting committee of individuals from the legal, business and governmental spheres. See http://www.nationalnotary.org/UserImages/Model_Notary_Act.pdf (last visited March 2, 2006). The Model Notary Act, in ss. 7-1 and 7-2, requires a notary to maintain a journal and suggests that the journal contain a list of information for each act performed; which would include the thumbprint of each principal and witness in a notarial act. The thumbprint requirement, along with several other requirements, was considered controversial by the committee. Comment, s. 7-2(a), Model Notary Act. The instant bill contains no such provision.

²¹ Section 117.05(2)(b)2., F.S.

Section 2 creates s. 117.071, F.S., requiring a notary to maintain a journal of each notarial act.

Section 3 provides an effective date of January 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Due to the new requirements of this bill, the amount of time necessary for a notary public to notarize a document may be increased, thereby potentially increasing the cost of businesses that rely on notary services.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Public Records Law

Under s. 119.07(1)(a), F.S.:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

As used in s. 119.07, F.S., the term “public records” means:

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.²²

As used in s. 119.07, F.S., the term “agency” means:

any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.²³

Because a notary public is a public officer under the State Constitution, the notary journal required by this bill may be a public record that is available for inspection and copying pursuant to Art. I, s. 24(a), Fla. Const. and ch. 119, F.S.

Journal Requirement

The *Reference Manual* drafted by the Governor's Task Force on Notaries Public in 1989 suggested the mandatory use of journals.²⁴ Moreover, while notary journals are not required to maintain a journal under current law, the *Reference Manual* recommends “any notary who is concerned with liability may want to consider this protective measure to provide a permanent record of his or her notarial acts.”²⁵ Furthermore, the National Notary Association maintains that the use of a notarial journal will assist in preventing real estate fraud. It appears that the NNA's chief tool in preventing real estate fraud is the requirement that each document signer place a thumbprint in the notarial journal; a requirement absent from this bill.

Detractors of the bill point to the increased responsibility a notary would have for each signature as being unduly cumbersome. Their concern revolves around the additional time needed for a notary need to comply with the new requirements.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 22, 2006, the Civil Justice Committee adopted an amendment removing everything after the enacting clause. The amendment modified the bill in the following manner:

- An exception to the journal requirement was created. A notary who is either an attorney licensed in this state or who is employed by an attorney licensed in this state is not required to maintain a journal of notarial acts.

²² Section 119.011(11), F.S.

²³ Section 119.011(2), F.S.

²⁴ *Reference Manual*, at 42.

²⁵ *Id.*, at 43.

- In the event a notary's journal is stolen, lost, misplaced, destroyed, or rendered unusable, the amendment requires the notary to notify solely the Executive Office of the Governor.
- The title was corrected.

The bill was then reported favorably with a committee substitute.

On March 22, 2006, the Justice Council adopted 2 amendments. The amendments modified the bill in the following manner:

- The required journal can either be a paper journal or one maintained on a computer or other electronic device; and
- A notarial act is the affixing of the notary's seal to a document accompanied by a written certification or jurat.

The bill was then reported favorably with a committee substitute.